FILED
JAN 2 5 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-715

IN THE
Supreme Court of the United States

JOHN WITTEN TUNNELL,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

WAYNE D. STRUBLE
BOWMAN AND BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
(612) 339-8682

Counsel for Respondent

213685

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Absent any conflict with a decision of another United States court of appeals, a state court of last resort or this Court, and absent any important question of federal law that has not been decided by this Court:

I. Is there any compelling reason to review a Fourth Circuit decision that a district court did not abuse its discretion in striking an expert's opinion as unhelpful and unreliable under Federal Rule of Evidence 702?

II. Is there any compelling reason to review a Fourth Circuit decision that a district court properly granted a directed verdict pursuant to Federal Rule of Civil Procedure 50(a)?

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company does not have a parent corporation, and no publicly held company owns 10% or more of Ford Motor Company's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. Whether the District Court Abused Its Discretion in Striking Wallingford's Testimony Is Not an Important Question of Federal Law That This Court Should Settle.	7
II. Whether the District Court Properly Directed a Verdict for Ford Does Not Call for an Exercise of This Court's Supervisory Power.	17
CONCLUSION	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Alevromagiros v. Hechinger Co.,
993 F.2d 417 (4th Cir. 1993) 4, 13

Blevins v. New Holland North America, Inc.,
128 F.Supp.2d 952 (W.D. Va. 2001) 14, 18

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) ..... *passim*

Ford Motor Co. v. Bartholomew,
224 Va. 421, 297 S.E.2d 672 (1982) ...13, 16, 17, 19, 20

General Electric Co. v. Joiner,
522 U.S. 136 (1997) 7, 10, 12

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 7, 10, 11

Redman v. John D. Brush and Co.,
111 F.3d 1174 (4th Cir. 1997) 4, 13, 14, 18

Sexton v. Bell Helmets, Inc.,
926 F.2d 331 (4th Cir. 1991) 13

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 50(a) i

Fed. R. Civ. P. 104(a) 11

Fed. R. Evid. 702 ..... *passim*

Sup. Ct. R. 10 .....6, 9, 12

STATEMENT OF THE CASE

On November 19, 1999, John W. Tunnell ("Petitioner") suffered severe burn injuries when a 1999 Mustang GT ("Mustang") manufactured by Ford Motor Company ("Ford") and driven by a drunk companion careened off a 35-mph residential road at 70-75 mph, crashed head-on into a utility pole, and caught on fire in Martinsville, Virginia.

On August 15, 2003, Petitioner filed this diversity action solely against Ford in the United District Court for the Western District of Virginia. As his only claim against Ford, Petitioner alleged that the Mustang was defective because it did not contain a battery cutoff ("BCO") switch to disconnect power to circuits and components that could ignite an electrical fire after a crash.

Before trial, Ford moved to preclude Petitioner's engineering expert, Jerry Wallingford, from testifying that the Mustang was defective without a BCO because that testimony was not based on reliable principles and methods establishing the feasibility and overall safety benefits of a BCO during all foreseeable uses of the Mustang. (JA92.) Without comment, the district court adopted the magistrate judge's recommendation to deny Ford's motion because Wallingford purportedly had studied government and industry data on BCO devices and tested his own prototype design in an exemplar Mustang. (Pet. App. 54a, 64a-66a.) For that reason only, because Wallingford's testimony "create[d] an issue of material fact as to whether reasonable consumers would have expected the vehicle at issue— a 1999 Ford Mustang

GT—to be equipped with a battery disconnect device," the district court also denied Ford's pretrial motion for summary judgment. (Pet. App. 52a.)

At trial, however, Wallingford admitted that he would not "call [the Mustang] defective" without a BCO, but merely believed "it would have been a safer vehicle" had it contained one. (Pet. App. 101a-102a.) Moreover, Wallingford admitted:

1. That no responsible motor vehicle manufacturer would install a BCO in a production vehicle unless it first analyzed and weighed the overall risks and benefits of the device during all foreseeable uses of the vehicle. (JA3434.)[1]

2. That, in the case of a BCO, a manufacturer would also need to determine which "critical circuits" should remain operational in a vehicle after a crash to protect users from other risks; for example, the risk that a second crash might occur if the driver of another vehicle could not see a vehicle crashed on the roadway because a BCO had cut off power to its headlights and taillights. (JA5306-07.)

3. That he, Wallingford, had not analyzed—and was not qualified to analyze—the overall risks and benefits of a BCO and had no opinion on which "critical circuits" should remain

[1] "JA" refers to the Joint Appendix filed by the parties in the Fourth Circuit.

operational after a crash, even though he realized that the use of BCO devices posed a variety of safety concerns that could result in injury and death. (JA3459-66, 5308, 5310-12.)

4. That he had not durability—or crash-tested his prototype BCO to determine its reliability and suitability for real-world uses. (JA5304, 5306, 5320-23.)

5. That he had not submitted his BCO prototype for peer review by the engineering community. (JA3823-24.)

6. That he also had not submitted his prototype or even the general outlines of his BCO theory to the National Highway Traffic Safety Administration ("NHTSA") on any of the three occasions that NHTSA had considered—but rejected—any BCO requirement for motor vehicles sold in the U.S. (JA3480, JA3822.)

7. That no conventional vehicle ever sold in the U.S. had a BCO of the type that he proposed for use in the Mustang. (JA3476-78, 3699-04, 3852-53.)

Ford therefore moved to strike Wallingford's testimony as both unhelpful and unreliable under Federal Rule of Evidence 702. Finding that "Wallingford's testimony did not measure up to what was promised" before trial, the court granted Ford's motion on both grounds. (Pet. App. 27a-35a.) The court found

that Wallingford's opinion was not helpful to the jury for two reasons.

1. Wallingford merely opined that the Mustang would have been safer with a BCO, rather than that the vehicle was defective without one; thus, Wallingford's opinion was "not germane" to the defect issue because Virginia law imposes product liability on a manufacturer only if its product is defective and not because it did not "adopt the safest conceivable design," *Redman v. John D. Brush and Co.*, 111 F.3d 1174, 1178 (4th Cir. 1997) (applying Virginia law), or "incorporate the best or most highly-advanced safety devices," *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993) (applying Virginia law). (Pet. App. 29a-33a; Pet. App. 14a-17a.)

2. In addition, Wallingford merely opined that a BCO would make the Mustang safer in "this particular accident," rather than in "the host of accidents that could potentially occur to any vehicle;" thus, his opinion was "of no value on the issue of defectiveness" because Virginia law imposes liability on a manufacturer only if its product is unreasonably dangerous for all ordinary or foreseeable uses, *Alevromagiros*, 993 F.2d at 420 (applying Virginia law). (Pet. App. 32a-33a; Pet. App. 15a-17a.)

Whether or not it was helpful, the district court also struck Wallingford's defect opinion as unreliable for two independent reasons:

1. Wallingford's conclusion that the Mustang would have been safer with a BCO "fail[ed] many of the explicit factors [for determining the reliability of] expert opinion established through *Daubert* and its progeny" because Wallingford failed to test his prototype BCO to determine its rate of error, submit his prototype for peer review, or demonstrate its general acceptance within the scientific community. (Pet. App. 34a-35a.)

2. Wallingford's conclusion that the Mustang would have been safer with a BCO also failed the risk-benefit methodology that he admitted any manufacturer would conduct before installing a BCO in a production vehicle because Wallingford failed to analyze "whether the safety benefit of the device would outweigh any additional risks that the device created," even though he knew that a BCO "potentially posed a variety of safety concerns that could result in death and injury." (Pet. App. 33a-34a.)

Without Wallingford's testimony, Petitioner could not prove that the Mustang was defective without a BCO, and the court therefore entered judgment as a matter of law in favor of Ford at the close of Plaintiff's case-in-chief. (Pet. App. 35a-42a.)

On appeal, a three-judge panel of the Fourth Circuit unanimously affirmed the judgment. (Pet. App. 1a-11a.) In an unpublished *per curiam* opinion, the panel held that the district court did not abuse its discretion in striking Wallingford's testimony as irrelevant under Virginia product liability law because Wallingford merely opined "that BCOs would be a desirable added safety device rather than a necessary correction for a defective product." (Pet. App. 6a.) In addition, the panel held that the district court did not abuse its discretion in striking Wallingford's testimony as unreliable under Federal Rule of Evidence 702 because Wallingford failed to "test the prototype (or any other available BCOs) to determine whether they would create safety problems in other scenarios or whether the choice of circuits, to which power would be maintained, was sufficient to ensure passenger safety" and because Petitioner presented "no evidence that Wallingford's BCO solution had been subjected to peer review or had been generally accepted within the automotive engineering community." (Pet. App. 7a.)

REASONS FOR DENYING THE PETITION

Petitioner has presented no "compelling reasons" to grant a writ of certiorari. *See* Sup. Ct. R. 10.

There is no conflict between the Fourth Circuit's decision and the decision of another United States court of appeals. *Id.*, R. 10(a). There is no important federal question that the Fourth Circuit decided in a way that conflicts with a decision by any state court of last resort. *Id.* There is no conflict between the Fourth Circuit decision and the relevant decision of this Court on an important question of federal law. *Id.*, R. 10(c).

There is only an attempt to manufacture an unresolved and important federal question out of a rule of evidence—Rule 702—subject to a district court ruling reviewable only for abuse of discretion. But the question as Petitioner poses it—"the scope of a trial court's gatekeeping discretion under Federal Rule of Evidence 702" (Pet. 18.)—is not unresolved; it has been confirmed three times by this Court in the past fifteen years.[2] Nor is the question still important; otherwise, Petitioner would have been able to cite at least one federal or state court decision positing the question's existence and difficulty. Finally, the question is not even a federal question because, as Petitioner argues it, the district court erred as a matter of Virginia state law in requiring Petitioner to prove that the benefits of a BCO outweighed its risks during all foreseeable uses of the Mustang.

Accordingly, and as detailed below, this Court should deny the Petition for a Writ of Certiorari.

I. Whether the District Court Abused Its Discretion in Striking Wallingford's Testimony Is Not an Important Question of Federal Law That This Court Should Settle.

According to the Petition, "[t]he overarching unanswered question arising from the *Daubert* trilogy . . . is what is the boundary between the discretion of the [trial judge] to decide the relevance and reliability of expert testimony and preserving the traditional power

---

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

of the jury to weigh the evidence and determine the credibility of witnesses." (Pet. 18.)

A.

Critically, though, Petitioner never asked the Fourth Circuit to decide this question. He never referenced "the *Daubert* trilogy" or, for that matter, even cited all three cases of the trilogy to the Fourth Circuit. He never asserted that the trilogy left "unanswered" some question of law, let alone an "overarching" question that transcends the particular facts and circumstances of this case. He never questioned, as he now questions, "the policy underlying Rule 702 and the balance of power between the judge and the jury." (Pet. 18.) Rather, and without even a hint to the Fourth Circuit that it faced an "important question of federal law," Petitioner simply disputed the district court's conclusions that Wallingford's expert testimony was neither relevant nor reliable and that, without Wallingford's testimony, Petitioner could not prove that the Mustang was defective without a BCO.

That fact is fatal to the Petition for three reasons. First, because Petitioner failed to appeal the issue to the Fourth Circuit, any "overarching unanswered question" about the *Daubert* trilogy has been waived. Second, because the Fourth Circuit understandably did not address an issue that Plaintiff never appealed, the question is not ripe for this Court's consideration. Finally, because Petitioner disputed only the district court's application of Federal Rule of Evidence 702, he now runs headlong into this Court's admonition that

"certiorari will be rarely granted when the asserted error [merely] consists of . . . the misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

B.

In any event, it simply is not true that some "overarching question" remains unanswered by the *Daubert* trilogy. Tellingly, Petitioner fails to cite even one published or unpublished federal or state court case positing the existence of this question—let alone characterizing it as some "overarching unanswered question arising from the *Daubert* trilogy."

For good reason cannot Petitioner cite any such case: The *Daubert* trilogy comprehensively addresses "the scope of a trial court's gatekeeping discretion under Federal Rule of Evidence 702." (Pet. 18.)

In *Daubert*, this Court explained that federal trial courts must act as "gatekeepers" of expert testimony by making a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592, 593. To that end, this Court recommended that federal judges consider (1) whether a "theory or technique . . . can be (and has been) tested," (2) whether it "has been subjected to peer review and publication," (3) whether there is a "known or potential rate of error," and (4) whether "the theory or technique enjoys general acceptance within a relevant scientific community." *Id.* at 592-94. Nevertheless, the Court freed trial judges to consider other factors,

explaining that "many factors will bear on the inquiry" into the reliability of an expert's testimony.[3] *Id.* at 593. Finally, despite what Petitioner implicitly disputes, this Court expressed confidence "that federal judges possess the capacity to undertake the necessary review of proffered expert testimony." *Id.* at 593.

In *Joiner*, this Court confirmed its confidence in federal trial judges by holding that trial court rulings on the reliability and relevance of expert testimony may be reversed only for abuse of discretion—the same deferential standard of review applied to all evidentiary rulings. *Joiner*, 522 U.S. at 141-43.

Finally in *Kumho Tire*, this Court clarified that the gatekeeper role set forth in *Daubert* applies not just to novel scientific theories but to all forms of expert opinion in order "to make sure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an

---

[3] As a subsidiary federal question, Petitioner asserts that it is "imperative" for this Court to decide "that a trial court might commit an abuse of discretion if it inflexibly applies the *Daubert* criteria without consideration of other criteria pertinent to reliability." (Pet. 23-24.) But This Court already answered that question in *Daubert* when it cautioned federal trial courts to conduct a "flexible" analysis of an expert's reliability based on the "many factors [other than four listed factors that] will bear on the inquiry." 509 U.S. at 593-94. Moreover, this Court confirmed that principle in *Kumho Tire* when it indicated that federal judges may consider "any other set of reasonable criteria" than the four *Daubert* criteria in determining the reliability of an expert's testimony. 526 U.S. at 159.

expert in the relevant field." *Kumho Tire,* 526 U.S. at 152.

Accordingly, there is no "overarching unanswered question" about the boundary between the trial judge's role in deciding the relevance and reliability of expert testimony and the jury's role in evaluating the weight and credibility of evidence.

That boundary is the same as for any other type of evidence. Under Federal Rule of Evidence 104(a), it is the judge who must determine all "[p]reliminary questions concerning . . . the admissibility of evidence," Fed. R. Evid. 104(a), including the evidence's relevance and threshold reliability; only then, if admitted, does the evidence's weight fall within the jury's province to decide. So, too, lay the boundary between judge and jury under Rule 702. It is the judge who preliminarily determines whether an expert's proffered testimony is reliable; then, once admitted, the weight of the expert's testimony is up to the jury to decide. With expert testimony, just as with all other evidence, the trial judge serves as the "gatekeeper" between admissible and inadmissible evidence, subject to reversal only for abuse of discretion. There is no question about it after the *Daubert* trilogy.

C.

Petitioner complains, though, that the Fourth Circuit and the trial court applied the "*Daubert* directive broadly." (Pet. 19.)

But "certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioner does not dispute that the trial court and Fourth Circuit properly stated the rule set forth in *Daubert* rule, including the four non-exclusive factors for determining the reliability of an expert's opinion. Nor does Petitioner dispute that the Fourth Circuit properly stated the standard of review set forth in *Joiner*.

Thus, the Petition raises no "important question of federal law" but merely complains about "misapplication of a properly stated rule[s] of law."

D.

Furthermore, the alleged misapplications of law to the relevance and reliability of Wallingford's testimony are wrong.

1. In evaluating the relevance of Wallingford's testimony, Petitioner asserts that the district court and Fourth Circuit erred by (a) "scrutinizing the trial testimony of Petitioner's expert for inconsistencies" and (b) "applying the substantive law of Kentucky, instead of Virginia." (Pet. 19.)

a. Neither court "scrutinized" Wallingford's testimony for inconsistencies. Wallingford plainly testified that he would not "call [the Mustang] defective" for lack of a BCO but merely believed the Mustang "would have been a safer vehicle" had it contained a BCO. (Pet. App. 101a-102a.) That admission rendered Wallingford's testimony irrelevant because, as a matter

of Virginia law, a product is not defective just because its manufacturer did not "adopt the safest conceivable design," *Redman*, 111 F.3d at 1178 (applying Virginia law), or "incorporate the best or most highly-advanced safety devices," *Alevromagiros*, 993 F.2d at 420 (applying Virginia law). Contrary to Petitioner's plea, it is not just a "credibility" issue for the jury to decide when an expert admits that his opinion is based on what he personally believes to be "safer" rather than on what the law considers to be "defective."

b. Nor did the district court or the Fourth Circuit apply Kentucky instead of Virginia law. The district court repeatedly cited cases applying Virginia law (Pet. App. 16a, 18a-19a, 21a n.2, 36a, 38a.), thoroughly discussed "Virginia common law rules" (Pet. App. 18a-21a.), and even distinguished *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 672 (1982)—the very same case which Petitioner asserts that the court ignored (Pet. App. 18a-19a.). So, too, did the Fourth Circuit open its overall discussion of the law by exclusively citing cases that applied Virginia law. (Pet. App. 5a, 9a.)

Petitioner complains because the district court and the Fourth Circuit cited one Kentucky law case, *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331 (4th Cir. 1991). But the district court cited merely cited *Sexton* "as instructive in identifying Virginia common law rules;" it did not apply Kentucky rather than Virginia law. (Pet. 18a.) Similarly, the Fourth Circuit cite *Sexton* to explain the consumer expectations test of a defective product—part of the same test employed by Virginia product liability

law. (Pet. 6a-7a.) Consequently, it is highly disingenuous for Petitioner to assert that the lower courts applied Kentucky rather than Virginia law.

2. In evaluating the reliability of Wallingford's testimony, Petitioner asserts that the district court (a) subjected Wallingford's testimony "to a judge mandated test (the risk benefit test)" of reliability and (b) failed to consider "whether other criteria [not set forth in *Daubert*] were pertinent to reliability." (Pet. 19.)

a. But it was not "a judge mandated test (the risk benefit test)" that Wallingford flunked. He flunked both a Virginia law test and a "Wallingford test" requiring an analysis of the overall risks and benefits of an alternative design, such as a BCO.

Wallingford flunked a Virginia law test because, as explained in *Blevins v. New Holland North America, Inc.*, 128 F.Supp.2d 952 (W.D. Va. 2001), "Virginia law encompasses a risk-utility analysis in negligent design cases." *Id.* at 959. *See Redman*, 111 F.3d at 1181 (holding that an alternative design that avoids one danger while creating others of similar or greater magnitude does not conform to reasonable consumer expectations of product safety under Virginia law).

Wallingford also flunked his own test—not "a judge-mandated test"—for evaluating an alternative design's risks and benefits. After all, it was Wallingford—not the trial judge—who testified that no responsible manufacturer would put a BCO into a production vehicle before conducting a risk-benefit analysis to establish (a) that the BCO's benefits outweighed its risks during all

foreseeable uses of the vehicle and (b) that the BCO maintained power to "critical circuits" after a crash to protect occupants from other post-crash hazards. It was Wallingford—not the trial judge—who admitted that he had failed to analyze the overall risks and benefits of his prototype BCO and that he had no opinion on what "critical circuits" should remain operational after a crash, even though he recognized that a BCO "potentially posed a variety of safety concerns that could result in death and injury." (Pet. App. 34a.) Thus it was Wallingford—not the trial judge—who set forth but failed the test for determining the reliability of expert testimony on BCO devices.

b. Given that Wallingford flunked his own reliability test, it is truly incredible that Petitioner would also assert that the lower courts "inflexibly applie[d] the *Daubert* criteria without consideration of other criteria pertinent to reliability." (Pet. 23-24.)

To be sure, each court applied the *Daubert* criteria in determining that Wallingford failed to durability—or crash-test his prototype BCO, failed to submit his prototype for peer review by the engineering community or NHTSA, and failed to establish its general acceptance in the engineering community. (Pet. App. 7a, 34a-35a.)

But neither court stopped there. Each further considered the criteria that Wallingford himself stated a manufacturer would consider—*i.e.*, the risks and benefits of a BCO. Indeed, each court considered a pair of criteria—*i.e.*, the risks and benefits of BCO devices—that *perfectly matched* Wallingford's own theory of defect—*i.e.*, that the Mustang would have been safer

with a BCO. Under Wallingford's own theory, the Mustang could not possibly have been safer with rather than without a BCO unless its benefits outweighed its risks. But Wallingford made no effort to analyze the overall risks and benefits of his prototype BCO.

E.

Ultimately, Petitioner complains that "[t]he Fourth Circuit did not consider the reliability factors set forth in *Ford Motor Company, Inc. v. Bartholomew* where the Virginia Supreme Court identified sources of proof and methods of analysis for motor vehicle design defect cases where no government or industry standards apply." (Pet. 25.)

Petitioner forgets, however, that the Federal Rules of Evidence—not Virginia substantive law—governs the admissibility of evidence. Thus, the district court did not abuse its discretion in determining the reliability of Wallingford's testimony based on (1) the four *Daubert* factors and (2) a risk-benefit methodology that even Wallingford endorsed. Even if Virginia law did not (as it does) require proof that the benefits of an alternative design exceed its risks to prevail on a design defect claim, Rule 702 grants federal judges the discretion to consider whether an expert performed a risk-benefit analysis on his alternative design in determining the reliability of the expert's methodology and opinions.

II. Whether the District Court Properly Directed a Verdict for Ford Does Not Call for an Exercise of This Court's Supervisory Power.

Lacking an important question of federal law, Petitioner urges this Court to grant certiorari under its general supervisory power over the federal courts because, allegedly, the district court violated the Rules of Decision Act. The alleged violation: Instead of *Bartholomew v. Ford Motor Co.*, the court applied a "judge-created risk-benefit test" to determine whether Petitioner presented sufficient evidence to avoid a directed verdict. (Pet. 27-30.)

A.

Petitioner, however, never raised a Rules of Decision issue on appeal to the Fourth Circuit. He never referenced or cited the Rules of Decision Act. He never asserted that the entry of a direct verdict violated the Rules of Decision Act. He never argued that the court so far departed from established legal standards that the Fourth Circuit should exercise its supervisory powers to reverse the judgment. Rather, and without so much as a hint to the Fourth Circuit that the Rules of Decision Act may have been violated, Petitioner simply disputed the district court's conclusion that Petitioner could not prove that the Mustang was defective without Wallingford's stricken testimony.

Accordingly, any alleged violation of the Rules of Decision Act has been waived on appeal or, for lack of Fourth Circuit review of the issue, is not ripe for consideration by this Court.

B.

Moreover, the "Rules of Decision Act violation" is just a bootstrap argument of the same "important federal question" that Petitioner asserts but cannot establish.

Petitioner argues, in effect, that the district court improperly struck Wallingford's testimony because Virginia law did not require Wallingford to show that the overall benefits of a BCO outweigh its risks in all foreseeable uses of the Mustang; *ipso facto,* Petitioner asserts, the court also violated the Rules of Decision Act in directing a verdict for Ford on the same ground.

But if, as already demonstrated, "Virginia law encompasses a risk-utility analysis in negligent design cases," *Blevins,* 128 F.Supp.2d at 959, then the district court did not violate the Rules of Decision Act any more than it improperly struck Wallingford's testimony. *See also Redman,* 111 F.3d at 1181 (fire-resistant safe was not defective under Virginia law because the plaintiff's alternative design—a burglar resistant safe—would decrease the safe's resistance to fire).

C.

In any event, no violation of the Rules of Decision Act occurred. Petitioner asserts that a violation occurred for one and only one reason—because the "district court opinion made no mention of *Bartholomew,*" which "was unquestionably the rule of decision for this case." (Pet. 28.)

But the district court did mention *Bartholomew*. What's more, the court specifically explained why *Bartholomew* did not provide the rule of decision for this case:

> First, it is simply not the case that Plaintiff's proposed alternative design here was already in use. Unlike the above cases [referring in part to *Bartholomew*], Plaintiff is proposing the use of [a BCO] in a protective manner that had never been pursued by any other producer before. Specifically, the [BCO] would cut off not just a particular circuit, such as a fuel pump, but *all circuits* in the car except a few so-called critical circuits. Further, based on the evidence before the Court, no other vehicle in the industry has such a device. Further, Plaintiff's own proposed design did not even identify exactly which "critical" circuits would be excepted . . . , so it is simply impossible to say that the proposed design is the same as one already in use. For this reason, Plaintiff cannot maintain that this case is analogous to those cited above, where the fact that a proposed design was previously in use already provided adequate evidence as to the risk-benefit analysis. Second, and equally important, the above cases are distinguished because their proposed alternative designs did not create potential new safety risks. In each of these cases Plaintiff cites, no defendant had argued that the plaintiff's proposed alternative design imposed new risks upon consumers that would have outweighed their

> potential safety benefits. In such circumstances, the defect analysis was simple, for it was effectively conceded that the proposed device would provide a net safety benefit. Yet when the potential drawbacks of a proposed alternative design are at issue, as here, evidence that the devices truly outweigh its risks becomes critical. The cases cited in Plaintiff's brief do nothing to undermine this concept.

(Pet. App. 20a-21a.) (italics in original) (footnote omitted)

The district court's distinction of *Bartholomew* is critical for two reasons. First, it demonstrates that no Rules of Decision Act violation occurred. Second, it destroys any claim that the court "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" because the court directly addressed the authorities that Petitioner erroneously thought should govern this case.

CONCLUSION

There are no compelling reasons to grant the Petition for a Writ of Certiorari. Ford therefore respectfully requests that the Petition be denied.

Respectfully submitted,

WAYNE D. STRUBLE
BOWMAN AND BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
(612) 339-8682

Counsel for Respondent